

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JERRY JONES, et al.,) Docket No. 04 C 8305
)
Plaintiffs,)
)
vs.)
)
HARRIS ASSOCIATES LP,) Chicago, Illinois
) February 8, 2005
Defendant.) 9:30 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - STATUS & MOTIONS
BEFORE THE HONORABLE CHARLES P. KOCORAS

APPEARANCES:

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PROCEEDINGS RECORDED BY
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1 THE CLERK: 04 C 8305, Jones vs. Harris Associates.
2 Status; motion to dismiss.

3 MR. FLYNN: Good morning, your Honor, Kevin Flynn,
4 local counsel for the plaintiffs.

5 And with me is Jim Bradley, one of the lead counsel
6 for the plaintiffs.

7 THE COURT: Good morning.

8 MR. BRADLEY: Good morning, your Honor.

9 THE COURT: Good morning.

10 MR. NASH: Good morning, Judge, Gordon Nash on behalf
11 of the defendant.

12 I am here with -- I am local counsel and I am here
13 with -- two attorneys from Ropes & Gray, John Donovan and Rob
14 Skinner. They are both the lead lawyers.

15 THE COURT: Oh, this is a heavy case that brought out
16 all of the heavy lawyers here.

17 (Laughter.)

18 THE COURT: What is this case about?

19 MR. DONOVAN: Your Honor, this is a --

20 THE COURT REPORTER: Do you want to state your name
21 for the record, please?

22 THE COURT: Did this just come up from the Western
23 District of Missouri? Is that the idea?

24 MR. DONOVAN: It did, your Honor.

25 MR. BRADLEY: Correct.

1 MR. DONOVAN: John Donovan for Harris Associates.

2 This is a Section 36(b) case under the Investment
3 Company Act, your Honor, which makes allegations that excessive
4 fees were charged by the advisor to several mutual funds.

5 THE COURT: Okay.

6 MR. DONOVAN: The case was brought in Kansas City and,
7 then, moved here.

8 There is a motion to dismiss that is pending, that was
9 -- we were required to file in Kansas City before the transfer.

10 There are some Seventh Circuit precedents, that we did
11 not cite when we removed to this Circuit, that we would like to
12 bring to your attention, either with a supplemental brief or we
13 can file a new brief, whatever makes sense for you.

14 THE COURT: Well, probably it would be more convenient
15 for you to just give me one document with all of your
16 authorities in it.

17 MR. DONOVAN: Fair enough.

18 THE COURT: So, when can you do that by?

19 MR. DONOVAN: We can do that in, say, three weeks?

20 THE COURT: Oh, that would be fine.

21 How much time would you like to respond to that?

22 MR. BRADLEY: Oh, that is more than enough.

23 MR. FLYNN: I think 14 days would be fine for us, your
24 Honor, to file it.

25 THE COURT: Okay. We will give you two weeks to

1 answer.

2 And, then, you will have a week to reply.

3 MR. DONOVAN: Okay.

4 THE COURT: Okay?

5 MR. DONOVAN: Yes.

6 THE COURT: Steve will give you the hard dates, as
7 well as an in-court ruling date.

8 THE CLERK: The defendant's brief is due March 1st;
9 the answer, March 15th; the reply, March 22nd.

10 THE COURT: What do you claim is the legal criteria
11 for assessing the propriety of fees and charges?

12 MR. DONOVAN: There is one seminal case, your Honor,
13 out of the Second Circuit called Gartenberg. It says that a
14 complaint must allege that the fees are so disproportionate to
15 the value of services rendered, that they could not have been
16 the product of arms-length bargaining.

17 Our contention is that this complaint does not meet
18 that standard for articulating, essentially, what for you is
19 second-guessing the judgment of trustees.

20 This is a case, your Honor, that has been brought -- I
21 should say that this case started in Kansas City, but it really
22 started three years ago in Southern, Illinois.

23 There are now -- this is a rather --

24 THE COURT: At least you are keeping it in the
25 Midwest.

1 (Laughter.)

2 MR. DONOVAN: There are eleven cases that are the
3 same, that are now pending. So --

4 THE COURT: Eleven?

5 MR. DONOVAN: -- Mr. Bradley and I were in Minnesota
6 on Friday --

7 THE COURT: Oh.

8 MR. BRADLEY: Right.

9 MR. DONOVAN: -- arguing this very motion on behalf of
10 American Express out there.

11 THE COURT: What, are you combining the Seventh and
12 Eighth Circuits, so you have got a swath of the country that --

13 (Laughter.)

14 MR. DONOVAN: We have the First and the Ninth and the
15 Second involved, too, I think.

16 THE COURT: Oh, you do?

17 MR. DONOVAN: I think so.

18 THE COURT: Okay.

19 MR. FLYNN: We needed the wisdom of the Seventh
20 Circuit, Judge.

21 (Laughter.)

22 THE COURT: Well, you will get something from the
23 Seventh Circuit, at least from me.

24 I do not know about wisdom, but I will give you the
25 best I can. Okay?

1 MR. BRADLEY: And I do not think Oakmark was filed in
2 that Nelson case. So, this would be the first one.

3 MR. DONOVAN: Oakmark was not.

4 THE COURT: Well, are there cases -- with all of these
5 courts involved -- going both ways on these issues; and, is it
6 amenable to a pleading consideration, as opposed to what the
7 facts are?

8 MR. BRADLEY: No, not in my opinion. It is a typical
9 --

10 THE COURT: A fact question?

11 MR. BRADLEY: It is a motion to dismiss standard. A
12 notice pleading.

13 There is going to be some argument on that point.

14 THE COURT: Well, that is what I am getting at. I
15 mean --

16 MR. DONOVAN: There certainly are cases --

17 THE COURT: -- the heart of it is you have to get into
18 what the actual fees were and what the evidence is about that.

19 MR. DONOVAN: Precisely.

20 But there are a number of cases -- probably the
21 majority of the cases -- that do dismiss Section 36(b) cases on
22 the pleadings. So, the weight of authority is certainly in
23 favor of dismissal.

24 Mr. Bradley is right, there are arguments. And I
25 think the Seventh Circuit's approach to this is particularly

1 important because of the way they look at economic matters and
2 the considerations they look at for the value of those
3 questions.

4 THE COURT: All right. I am quite willing to be
5 educated.

6 Steve, did you give them the dates?

7 THE CLERK: Ruling is April 7th, 9:30.

8 THE COURT: We will see how it plays out.

9 MR. DONOVAN: Thank you, your Honor.

10 MR. NASH: Thank you.

11 Judge, in the interim, you know, typically in these
12 cases I am advised that the parties are familiar with the
13 various discovery exchanges. May we proceed with discovery --
14 with written discovery -- in the case?

15 THE COURT: Well, I mean, normally you would not go
16 ahead until we resolve whether the case properly is in court.
17 So, that would be my guess.

18 And the other, in supporting that concept, is if you
19 had discovery in other cases, I probably would not see any
20 reason why some of that might not be usable in this case, if we
21 should go to that step.

22 But my comfort level is increased by not permitting
23 discovery until we resolve the pleading matters. Okay?

24 MR. FLYNN: That is fine, your Honor.

25 MR. NASH: Thank you.

1 THE COURT: All right.

2 MR. DONOVAN: Thank you, your Honor.

3 MR. BRADLEY: Thank you.

4 * * * * *

5 I certify that the foregoing is a correct transcript from the
6 record of proceedings in the above-entitled matter.

7 /s/ Joene Hanhardt
8 Official Court Reporter

October 12, 2011

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